IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL APPEAL NO.412 OF 2001

Subhash Shankarrao Deshmukh,)
Age: 45 years,)
R/o.Deshmukh Kamble, Tal. Mahad,)
Dist. Raigad.).. Appellant

Vs.

The State of Maharashtra,)
(At the instance of Mahad)
M.I.B.C. Police Station,)
Dist. Raigad.).. Respondent

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Shri A.P.Mundargi, learned counsel, holding for Shri Ganesh Gole, Advocate for the appellant.

Smt.V.R.Bhonsale, APP for the State-Respondent.

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CORAM : N.V.DABHOLKAR &
SMT.V.K.TAHILRAMANI, JJ

DATED : 16TH FEBRUARY, 2006

ORAL JUDGMENT : (PER N.V.DABHOLKAR, J)

1. This is an appeal under Section 374(2) of the Code of Criminal Procedure, 1973, challenging the judgment and order in the Sessions Case No.56 of 1999, by which the appellant-accused is held guilty of offence punishable under Section 302 of the Indian Penal Code, and sentenced to suffer life imprisonment, pay a fine of Rs.500/-, in default, rigorous imprisonment for one year. The decision in

the said Sessions Case was rendered by the Sessions Judge, Raigad at Alibag on 26th February, 2001.

2. The prosecution story can be summed up as under:-

. The incident in question took place on the night between 21st and 22nd January, 1999, and Smita, the victim was admittedly the wife of the present accused. They were staying at the village Deshmukh Kamble, Taluka - Mahad, District - Raigad, since about 1992. Earlier, the accused was serving in police department at Bombay, and simultaneously, Smita was in private employment. The accused lost his job in the year 1987. The wife continued her service for another 4 to 5 years, whereafter, the couple decided to shift to village Deshmukh Kamble. Inspite of this, the children, a son and a daughter, were left at the care of P.W.1 Vithal Naik, brother of the victim and maternal uncle of the children, in the interest of educational facilities.

. It is said that the accused was addicted to drinking habit. He was not earning anything, and he was ill-treating the victim Smita. The learned trial Court appears to have accepted this, as the motive for murder. On the alleged night, the victim is said

to have been killed by strangulation (from the judgment, we get an impression that the learned trial Judge is not confident whether strangulation was by hanging or otherwise.).

. Criminal Law was set into motion by the complaint, Exhibit-9, lodged with Mahad Police Station by Vithal Naik (PW 1) on 22nd January, 1999 at 20.50 hours, and after completion of investigation, the charge sheet was filed in the Court of Judicial Magistrate, First Class, Mahad. The trial, that proceeded with the Sessions Judge, Raigad, after committal, has ended in conviction of the accused.

3. The prosecution has examined in all nine witnesses. This includes deposition of complainant Vithal and the child witness Snehal (aged 15 years). These witnesses are brother and daughter of the deceased. In fact, Snehal is daughter of the accused and the deceased. P.W.5 Mohan Deshmukh was examined for bringing it on record, that before bedtime of 21st January, 1999, there was a quarrel between these spouses. Mohan (PW 5) has turned hostile. To our shock, paragraph 22 of the judgment indicates that the learned Judge has relied upon the contradiction, that is brought on record by the prosecution through

the deposition of investigating officer, of Mohan having made a particular statement, which he was denying from the witness box. PW 4 Rajendra Deshmukh is a resident of that locality. According to him, many people from the locality were to attend wedding of his nice Rajeshri on 22nd January, 1999. They were to travel by one vehicle, and hence he had given a call to the accused from outside the house. Although the accused responded from the house, he did not accompany party for marriage. It appears that the evidence of Rajendra (PW 4) and Mohan (PW 5) is tried to be relied upon for the purpose of showing the continuous presence of the accused in the house from 21st night till 22nd morning.

. PW 3 Prahlad Gaikwad, was a Medical Officer at Mahad, and after carrying out the post-mortem, he has recorded an opinion that the death was caused by strangulation. To be precise, he has recorded that the death was due to asphyxia, due to strangulation. PW 6 Suman Deshmukh attended the proceedings of Inquest Panchanama. PW 7 Vinod Deshmukh was a panch witness, when the panchanama of the spot was drawn and some articles were seized from that location. PW 8 Subhash Lad was present, when the clothes of the deceased (after post-mortem) were seized. Three panchanamas are at Exhibits-16, 18 and 20. PW 9 PSI

Sanjay Sawant had carried out the investigation.

. The accused has taken a bold defence of his wife having committed suicide on that night, when he was not at home, and when he was attending a Kirtan at Ganesh Temple, since it was a Ganesh Jayanti. He has replied the last question during his statement under Section 313 of the Code of Criminal Procedure, 1973, as follows:-

> "On that day, I was not present in the house on account of Ganesh-Jayanti, I had gone to Temple for hearing Kirtan. In the morning some boys came in the temple and told that I was called, I therefore, went to house and found that Smita was found hanging with help of rope. On seeing it, I fell down due to giddiness I do not know, what happened thereafter. I myself, my mother and Smita were staying together in the said house."

. The defence has challenged the evidence of autopsy surgery by examining Dr.Arun Ishwara Gavali, the then Civil Surgeon at Alibag, as defence witness. By reading the notes in the post-mortem report,

Dr.Gavali has provided opinion evidence, that if the legature mark is by the rope, which is before the Court, and diameter thereof is about 0.5 c.m., then the width would not be more than 1 c.m. He has also opined that since the post-mortem notes indicated that rigor mortis was present, death must have occurred 24 hours prior to post-mortem. He is also examined for bringing it on record that, even in cases of hanging, there is likelihood of complete encircled legature mark around the neck.

4. We have heard Shri A.P.Mundargi, learned counsel, holding for Shri Ganesh Gole, the learned Advocate for the appellant and the learned APP Smt.V.R.Bhonsale for the Respondent-State. At the outset, we would like to refer to the couple of instances in the judgment of the trial Court, wherein, he has placed reliance on inadmissible evidence, out of which, we have already referred one.

. In paragraph 22, the learned Judge has referred to the deposition of PW 5 Mohan Deshmukh. As can be seen from the deposition, Mohan was declared hostile by the learned APP, and inspite of being subjected to reasonable cross-examination, he denied to have made any statement to the police to the effect that, on the former evening, accused was

under the influence of liquor and that there was a quarrel between him and the victim wife. He also denied to have stated before the police, that the accused was addicted to liquor and always picking up quarrel with his wife. Both these portions from the police statement, contradicted by Mohan (PW5), were marked "A" and "B" and those were got proved by the prosecution during the evidence of investigating officer PSI Sawant. Because, those are so proved, we are afraid, those cannot be used as substantive piece of evidence. The only benefit that the prosecution can enjoy, as a result of bringing contradiction on record through the evidence of investigating officer, is that the prosecution can persuade the Court not to disbelieve any other witness because his deposition is at variance with the witness who is declared hostile. In paragraph 22, the learned Judge observed regarding these contradictions as follows:-

> "Therefore, I am satisfied that the witness Mohan Deshmukh, though has not supported the prosecution in toto, but the fact remains that his evidence is sufficient to come to definite conclusion that on the said night only accused and deceased were present in the said portion of the house and there was

no third person."

. We are afraid that the contradictions cannot be used as evidence rendered by Mohan Deshmukh. Only those facts, which the witness deposed on oath from the witness box, assume character of legal evidence. The learned trial Judge has indulged into commission of illegality in relying upon the contradictions as substantive piece of evidence.

5. In paragraph 14 of the judgment, the learned Judge has discussed the evidence of PW 1 Vithal Naik and PW 2 Snehal. both of them spoke about having heard stories of ill-treatment at the hands of accused from the deceased. The learned Judge has placed reliance on this evidence to quite a serious extent by observing as follows:-

> "Thus the motive appears to be that as accused was addicted to liquor and that must be the fact for Smita to object it and that accused should improve himself, but as accused was unable to leave his habit, of drinking liquor and because of that there must be quarrels between them and that must be the motive for the accused to commit

offence."

. By placing reliance upon the evidence of Vithal (PW1) and Snehal (PW2), the learned Judge has committed one error of placing reliance on inadmissible evidence. The learned Judge lost the sight of the fact that he had charged the accused only for an offence under Section 302 of Indian Penal Code. The accused is neither charged for abetment to commit suicide under Section 306, nor for the offence punishable under Section 498-A on the allegation, that being fed up of ill-treatment, wife committed suicide. In such circumstances, stories of ill-treatment deposed to by these two witnesses, as heard from the victim, is hearsay evidence. It does not assume character of admissible evidence even by the support of Section 32(1) of the Evidence Act. This is because, the ill-treatment is not a circumstance in any way linked with the death of the victim, as the cause of death, or transactions leading to the cause of death. We are fortified in taking such view in the light of the decision of the Supreme Court in the case of Gananath Pattnaik v. State of Orissa, reported in (2002)2 SCC 619. The learned Judge did not end discussion by relying upon inadmissible evidence, but he was required to arrive at a conclusion that motive is available on record by

some imagination and conjecture. There is no evidence from Vithal and Snehal of having heard Smita that she tried to persuade her husband so that he should refrain from his liquor consumption, and yet, the accused was obstinate, still the learned Judge has imagined that she might have objected to his drinking habit, and therefore, quarrel must have been taking place. Isolated incident of quarrel also could not come on record due to hostility of PW 5 Mohan.

6. In paragraphs 9 to 11, the learned Judge considered the issue, whether the death was homicidal. After discussing the medical evidence, as rendered by PW 3 Dr.Pralhad Gaikwad, the learned Judge cursorily dismissed the evidence of defence witness Dr.Arun Gavali, without recording any reason for such rejection in paragraph 10 of the judgment. This error is amended by the learned Judge to some extent by discussing the evidence of Dr.Arun Gavali at length, later in paragraph 18 of the judgment. We intend to quote observations of the learned Judge, as recorded in paragraph 11.

> "I have restrained myself from appreciating the aspect as to whether definitely it is the case of

> strangulation and the aspect of suicide can totally be ruled out while deciding the aspect about the homicidal death, and I am satisfied that the circumstantial evidence on record and the medical evidence will definitely show that the cause of death of Smita Deshmukh was strangulation and, therefore, the prosecution has duly established and proved the fact that Smita Deshmukh met with homicidal death."

. Unfortunately, the learned trial Judge has recorded two conflicting observations in single breath. Earlier, he indicated his intention to hold the death to be by strangulation and reserved his finding, whether the same is homicidal or suicide to be recorded after considering and appreciating other material on record. However, in the later half of the sentence, he has reached to the conclusion that the death was homicidal.

. We are with the Judge to the extent he accepted the opinion and arrived at a conclusion that the death was by strangulation. However, mere medical evidence was not sufficient to record a

finding that the death was homicidal, unless the prosecution could establish by other evidence that some person other than the victim herself had contributed to strangulation. The observation of the learned Judge to that extent is erroneous.

7. The learned Judge has certainly realised that it is a case based on circumstantial evidence, and the circumstances, by which the trial Court felt persuaded to believe that the prosecution has brought home the guilt beyond reasonable doubt, are discussed in paragraph 21 of the judgment. Those can be summarised as follows:-

(i) Victim and the accused were only family members;

(ii) Accused was addicted to liquor;

(iii) Accused does not offer any explanation;

(iv) Explanation, that the accused was not at home, is not established; and

(v) Scissor in the drawer is abnormal.

. Out of the five circumstances, there need be no quarrel over the circumstance at Sr.No.1 above. Admittedly, the children were kept with maternal uncle, and although, the accused said during the statement under Section 313 of the Code of Criminal Procedure, 1973, that his mother was third family member, the defence has not succeeded in obtaining an admission to that effect from any of the prosecution witnesses.

. So far as the second circumstance is concerned, we are afraid that the same may not be sufficient to show adequate motive for murder, not only that but the same also can be a circumstance creating a possibility of suicide. Without referring to the merits of the admissibility of evidence on that count, if we are to believe that the accused was unemployed since 1987, the wife having left service since 1992, there was no source of stable income, husband was addicted to liquor, and therefore, had become quarrelsome. If liquor addiction drives the husband to commit murder of the wife, the sum total of the above circumstances is sufficient to cause frustration to a married woman and drive her to commit suicide under mental depression. These circumstances relied upon by the learned trial Court do not necessarily lead to a possibility of murder

only. The observation of the learned Judge that the accused has offered no explanation is against the record. But the circumstances at Sr.Nos.3 and 4, as enlisted by the learned Judge, may be read together to hold that the trial Judge felt the explanation of accused to be unacceptable. We have quoted reply given by the accused to the terminal question during the statement under Section 313 of the Code of Criminal Procedure, 1973. The accused claims that, being Ganesh Jayanti, the entire night he was at Ganesh Temple, and he returned home only when some boys called him in the early morning. Whether this explanation should be accepted as plausible, can be considered in the light of some other circumstances available on record. We refer to cross-examination of PW 7 Vinod, who is a panch witness to the panchanama of scene of occurrence. He admits that :-

> "it is correct that we had seen the nylone rope which was tied to the wooden beam of the kitchen. It is correct that the said stool was near the spot on the ground where the rope was tied" (to the beam).

The learned Judge has referred this situation during the discussion of reasons in paragraph 15, and has summarily dismissed the same by observing that "I am

of the view that this mere circumstance will not be of any much importance to jump to the conclusion about the fact that it is the death by suicide and not by strangulation." We are of a considered view that this fact situation, as admitted by panch witness, could not have been brushed aside so lightly. As a next circumstance, the learned trial Judge has drawn an adverse inference against the accused because the scissors were kept properly in the drawer. The learned Judge felt that a person who has seen his wife hanging by beam, presumably having committed suicide; will not have the time to place the scissor at its usual location, after cutting the rope for the purpose of bringing down the dead body. Impliedly, the learned Judge has suggested the accused to have made a show of wife having committed suicide by hanging. However, the learned Judge did not discuss that aspect in detail, in the context of these circumstances, that beneath the rope, there was a wooden stool. The beam was at the height of about 7 and 1/2 ft. from the ground, and if, at all, a woman of Indian height desires to commit suicide, assistance of some footrest was necessary for a successful hanging suicide. If, at all, this circumstance is to be brushed aside, the trial Court should have been bold enough to say, that it is a scene created by accused in order to save his skin.

Unfortunately, it is not possible to draw such a harsh inference against the defence. Medical evidence shows only one legature mark around the neck. If the victim was subjected to fatal strangulation by taking her by surprise (because, there is no evidence of any resistance and consequent injuries, either on the person of the victim, or on the person of the accused) and then the victim was to be hanged by beam for the purpose of creating a show of suicide, there ought to have been a couple of legature marks around the neck, one ante mortem and another post mortem. Eventually, there is single legature mark around the neck.

. There does not appear to be a serious attempt before the trial Court to bring on record, whether the legature mark was horizontal or oblique strangulation. The deposition of Dr.Gaikwad pertaining to injuries is reproduced by the learned Judge in paragraph 16 of the judgment, and the portion, which we desire to rely upon, reads thus:-

> "3. contused abrasion around the neck on upper part of neck, lower of mastoid process touches the angle of mandible on the right side. Contused abrasion on left side is 1" below angle of mandible.

Contused abrasion on posterior part of neck is present and it is completely around the neck, length of strangulation is 15". Breadth of contused abrasion is 1" on right side back and remaining is 1/3" of breadth."

. We feel that within description of the injuries, there are reasons to believe that the legature mark is not horizontal. On the right side of the neck, it touches mandible, and on the left side, it is 1" below angle of mandible. Although the legature mark is complete, the fact, that the width of legature mark is different on the two sides of the neck, is more compatible with the strangulation by hanging than horizontal strangulation, while the victim is made to lie on the ground.

8. We do not wish to go into many more details of opinion evidence rendered by the two medical officers and the clash of opinion created on record. Suffice it to say that the two circumstances, relied upon by the learned Judge, do not necessarily rule out the possibility of death being otherwise than homicidal.

. The circumstances, relied upon by the learned

trial Judge as a possible motive, are also capable of creating a possibility of suicide. The medical officer has opined that the death is by strangulation and legature mark along with the other circumstances on record also keeps a possibility open that death may be by hanging and not by horizontal strangulation. Strangulation by hanging is possible in homicide as well as suicide, but possibility of homicidal hanging stands weakened by absence of evidence regarding injuries of violence on the persons of the accused and the victim.

. According to PW 1 Vithal, he was telephonically informed by one Madhukar Deshmukh in the morning of 22nd January, 1999 that his sister was serious. As per the deposition of PSI Sawant, the Police Patil of village Deshmukh Kamble had lodged a report regarding accidental death of Smita. The prosecution has refrained from examining the said Madhukar Deshmukh and Police Patil, who could have probably given the first-hand details of the circumstances on the location.

9. For the reasons discussed hereinabove, we are of the view that the prosecution has not established its case to the standard, required in the matters based on circumstantial evidence. It can, at the

most, come to a level that the accused "may have" but not to the level "must have" committed the offence. The accused is, therefore, entitled to an acquittal, and hence, the appeal succeeds.

10. The appeal is allowed. The judgment and order dated 26th February, 2001 delivered by the Sessions Judge, Raigad Alibag, in Sessions Case No.56 of 1999 thereby holding the appellant guilty of offence punishable under Section 302 of I.P.C. is quashed and set aside. The appellant is acquitted of the charge. He be set to liberty forthwith, if not required in any other cases.

. The Registrar (Judicial) shall ensure early despatch of suitable writ."

(V.K.TAHILRAMANI,J) (N.V.DABHOLKAR,J)